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Nos. 09-784 and 09-804

In the Supreme Court of the United States

JANICE C. AMARA, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

CIGNA CORPORATION, ET AL., RESPONDENTS

CIGNA CORPORATION, ET AL., PETITIONERS

v.

JANICE C. AMARA, ET AL., RESPONDENTS

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF AMARA PETITIONERS

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SUPPLEMENTAL BRIEF

The Amara Petitioners (and Respondents in 09-804) submit this brief in response to the brief for the United States as amicus curiae.

I. CIGNA'S PETITION SHOULD BE DENIED.

As Respondents, the Amara class agrees with the Government's position about what is required, and not required, to obtain a remedy for violations of the statutory and regulatory requirements for Summary Plan Descriptions (SPDs) and Summaries of Material Modification (SMMs). SG Br. at 11-19. The Amara Respondents also agree with the reasons why certiorari is inappropriate based on CIGNA's petition. *Id.* at 10-19. The Government's position is consistent with the Department of Labor's longstanding regulations requiring SPDs to "accurately reflect the contents of the plan" and be "sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan." 29 C.F.R. 2520.102-2(a) and 2520.102-3. SMMs must likewise "understandably" describe material modifications to a plan, including "any change in the information" required to be disclosed in the SPD. 29 C.F.R. 2520.104b-3(a).

Although the Government does not take a position on the waiver issue, Respondents reiterate that CIGNA did not challenge the Second Circuit's "likely prejudice" standard below. CIGNA's Reply offers only two cites to support such a challenge. Reply at 3. First, CIGNA cites a footnote from its own appellate brief, which merely states: "Defendants acknowledge that

other Courts of Appeals have also held that an SPD can effectively modify the terms of an ERISA plan, although some require a showing of prejudice or detrimental reliance and others do not." This does not challenge the "likely prejudice" standard. CIGNA then pulls a quote out of context from *Amara*'s *appellate reply brief*, which stated that CIGNA "argues that *Burke* ... should be overturned and that this Circuit should hold that inadequate or misleading SPDs should not control over conflicting plan terms," citing CIGNA's Appellate "Br. at 43-48." That sentence, and the referenced pages, also relate to CIGNA's argument that *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), precludes relief for an inadequate SPD even with a showing of reliance or prejudice.

II. THE COURT SHOULD GRANT AMARA'S PETITION, VACATE THE SUMMARY AFFIRMANCE OF THE DENIAL OF RELIEF FOR THE ERISA §204(h) VIOLATION AND THE REPRESENTATIONS THAT "SIGNIFICANT REDUCTIONS IN THE RATE OF FUTURE BENEFIT ACCRUAL WERE NOT A COMPONENT" OF THE CHANGES AND REMAND FOR CONSIDERATION IN LIGHT OF *CONKRIGHT*.

The Government's position that certiorari should be denied on Amara's petition is based on a misreading of the District Court's decision on available relief for the ERISA §204(h) violation. SG Br. at 21. After determining based on a seven-day trial that ERISA §204(h) was violated, the District Court separately

ruled that the remedy of reinstatement to the prior formula was an "impossibility." App. 42a.[1] The District Court was "particularly reluctant" to order a "widespread return" to the prior formula given the large number of participants and CIGNA's exposure. App. 25a, 41a. The court determined that the only way the Plaintiff class could obtain that remedy was by proving "bad faith." App. 41a. "Bad faith" is not a requirement for a §204(h) violation, either before or after the 2001 EGTRRA amendments. See P.L. 99-272, §11006(a) (1986) and P.L. 107-16, §659 (2001). The remedy for a violation of §204(h) is built into the terms of the statute: An amendment that reduces the future rate of benefit accruals is ineffective unless it is disclosed in advance as the statute requires.[2]

As *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 128 S.Ct. 2131 (2008), held, the liability

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[1] Citations to the "App." are to the Appendix in 09-784.

[2] See, e.g., *Frommert v. Conkright*, 433 F.3d 254, 268 (2d Cir. 2006) ("without such proper notice to Plan participants, the amendment was ineffective as to them"); *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1404 (7th Cir. 1992) (because the amendment that violated Section 204(h) is "ineffective," "the plan continued in force as if it had not been amended"); *Hakim v. Accenture United States Pension Plan*, 656 F. Supp. 2d 801, 814 (S.D.Ill. 2009) ("if Plaintiff prevails on his § 204(h) claims, the 1996 Amendment can be deemed ineffective as to him, and he may be entitled to additional Plan benefits"); *Buus v. WaMu Pension Plan*, 2007 WL 4510311, *4 (W.D.Wa. 2007) ("the appropriate remedy under 29 U.S.C. §1054(h)" is that the amendment "that reduced Plaintiffs' rate of benefit accrual should be disregarded").

requirements in a statute cannot be revised to impose additional requirements through the "back door." 128 S.Ct. at 2142. Accord *Hardt v. Reliance Standard Life Ins. Co.*, __ S.Ct. __, 2010 WL 2025127, *7 (2010) (denying relief under a statute based an "invented" element is equivalent to denying the right granted by statute).

With respect to a remedy for the representations in CIGNA's SMM that retirement benefits would be "comparable" or "larger" (with no "cost savings" to CIGNA) after the changes to the formula, the Government avoids the principles that it espouses in response to CIGNA's petition by characterizing these representations as a "vague promise." SG Br. at 20. The Government's characterization is contradicted by the District Court's trial findings: The District Court found that CIGNA "misled plan participants into believing that significant reductions in the rate of future benefit accrual were not a component or a possible future result of Part B." App. 185a. This finding does not suggest a "vague promise," but an enforceable contractual condition.

The Government's characterization of "comparable" as "vague" is also contradicted by the case law on contract provisions based on "comparable" benefits or jobs. As the Amara petitioners have shown with citations to seventeen cases, Pet. Br. at 23-26, a promise that something will be "comparable" to an objective existing standard, e.g., a representation that "significant reductions in the rate of future benefit accrual [are] not a component or possible future result" of a change, can be enforced without having "entirely

to rewrite" a plan. The District Court can order that no significant reductions in the rate of future benefit accrual will occur by reference to benefits under the prior provisions, the same as in cases where a contract promises that a benefit, a job, materials used or supplied, a contracting party's performance or an end-product will be "comparable" to an objective standard.

This Court has repeatedly recognized that employee benefit plans are part of the contract of employment.[3] It also recognizes that ERISA-required

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[3] See, e.g., *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 20, 26-28 (1962) ("strike settlement agreement" that included provisions not to reduce employee benefit programs is "contract" enforceable under Section 301 of the LMRA because it affects "working conditions"); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 n.20 (1971) (retiree has "a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed"); *Alabama Power Co. v. Davis*, 431 U.S. 581, 592-93 (1977), ("It is obvious that pension payments have some resemblance to compensation for work performed. Funding a pension program is a current cost of employing potential pension recipients, as are wages"); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (recognizing the "repeatedly emphasized purpose [of ERISA] to protect contractually defined benefits" and describing a claim for benefits as an action to recover "contractually authorized benefits"); *Lockheed Corp. v. Spink*, 517 U.S. 882, 893-94 (1999) ("Among the ... legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily").

summaries are part of the "instruments governing" such plans. *Kennedy v. Plan Admin. for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865, 877 (2009). For the employment contract to be effective and binding, the courts must provide remedies for violations, including for ERISA notices that benefits will be "comparable" and that "significant reductions in the rate of future benefit accrual [are] not a component or a possible future result" of a change to a plan's benefit formula.[4]

The Government's position that the District Court recognized that it possessed broad discretionary authority to remedy these violations, but exercised its discretion not to do so (SG Br. at 20-21) is belied by the District Court's statements about "impossibility," "bad faith," and the need "entirely to rewrite" the plan, as well as the District Court's recognition of its "considerable uncertainty" with the "particularly troublesome" outcome that reinstatement to the prior formula was an "impossibility" and its plea for guidance from the Second Circuit. Now, following the grant of certiorari and decision in *Conkright v. Frommert*, 130 S.Ct. 1640 (2010), everyone, including the Government and CIGNA in opposing a GVR, recognizes that the district courts possess "broad remedial authority" to redress violations of ERISA's notice requirements. That agreement did not exist before *Conkright*. Instead, CIGNA argued below that

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[4] The Government repeats the District Court's statement that Plaintiffs "concede[d] that the Court does not have such authority." But Plaintiffs' position was that the Court could provide the requested relief *without* having to "entirely rewrite" the Plan. App. Br. at 46; Pet. at 9 n. 2.

the District Court lacked any such authority. 1/13/09 Br. of Appellees at 52 ("there is no basis for awarding benefits based on the terms of Part A before the freeze"); *id.* at 54 ("[T]here is nothing in any of ERISA's remedial provisions that allows a court to act as a plan sponsor and create a new benefit formula"). In light of *Conkright* and the agreement of the parties and the Government concerning the district courts' broad remedial authority, the class and the District Court deserve the opportunity to make a decision on relief for CIGNA's notices that reductions "were not a component or a possible future result" of the new benefit formula without the "considerable uncertainty" that permeated the remedies decision.

As in *Conkright*, the ERISA violations at issue here include violations of ERISA §204(h)'s notice provisions. This Court granted certiorari in *Conkright* to address the district court's "'allowable discretion' ... in the course of calculating additional benefits due under the plan as a result of an ERISA violation." No. 08-810. The majority decision recognizes, as does the dissent, that even if deference to a new plan interpretation continues after "a single honest mistake," the District Court has the responsibility to determine whether a plan administrator's proposed interpretive approach to a remedy "violate[s] ERISA's notice requirements." 130 S.Ct. at 1652 n.2. *Conkright* recognizes that whether the proposed remedy violates ERISA is "an argument about the merits, not the proper standard of review"and cites pages 25-26 of the Government's amicus brief which states that a plan administrator's proposed interpretation and remedial

approach may not recreate the violations that spawned the litigation or create new violations of ERISA's notice requirements.[5] Here, the Second Circuit's summary affirmance of the District Court's decision not to provide relief for the violations of ERISA §204(h)'s notice requirements and the SMM requirements, which was rendered after the grant of certiorari in *Conkright*, did not offer any explanation or guidance for the District Court on its allowable discretion. The Second Circuit's summary affirmance should be vacated and remanded for a determination of relief on "the merits" with no deference to any non-interpretive positions taken by CIGNA such as that there was "no basis for awarding benefits based on the terms of Part A before the freeze" or that the District Court should be "particularly reluctant" to order a "widespread return" to the prior formula.

The Government diminishes the importance of Amara's petition by stating that "whether the district court misapprehended the remedies available under the prior version of Section 204(h) is of little continuing importance." SG Br. at 21. This ignores the principles related to a GVR and the rights of a 27,000-person class.[6] The Government's statement is also

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[5] See also 130 Sup.Ct. at 1650 (holding that deference to plan interpretations is separate from the question of whether "specific provisions requiring use of the phantom account method could not be applied to respondents due to lack of notice").

[6] See Eugene Gressman, et al, *Supreme Court Practice* (9th ed.), §5.12, at 349 ("It seems fairly clear that the Court does not treat the summary reconsideration order as the functional

inaccurate because the District Court's requirement of "bad faith" when a nominal "freeze" is interposed between a prior formula and reductions in future benefits would create a continuing loophole under both the current and the prior versions of ERISA §204(h). The Government's position also depends on the improper characterization of the trial finding that reductions were "not a component or a possible future result" as a "vague promise," even though the ability to enforce promises of "comparable" benefits with no "significant reductions" is clearly of continuing importance to employees nationwide.

The Government lastly asserts that the District Court's decision to provide relief for the periods of "wear-away" while providing no relief for the §204(h) violation or the representations in the SMM of comparable or larger benefits with no significant reductions is a "fair remedy." SG Br. at 20. Apart from the fact that these are separate violations, the District Court recognized that the remedy for the periods of "wear-away" provided only 20-25% of the relief required to remedy the other violations and that thousands of class members would be left with no relief because they were unaffected by the wear-away periods. See App. 47a-48a.

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equivalent of a summary reversal order and that the lower court is being told merely to reconsider the entire case in light of the intervening precedent–which may or may not compel a different result"); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1984) (a GVR does "not amount to a final determination on the merits" but simply "indicate[s] that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive to compel reexamination of the case").

In summary, the Government's rationale for why *Conkright* will not support a GVR for the Amara Petitioners is unsatisfactory for three reasons. First, the District Court literally pleaded for guidance from the appellate court and expressed "considerable uncertainty" about its discretionary authority to remedy the violations that it found absent "bad faith" or having "entirely to rewrite" the plan.

Second, this Court's grant of certiorari in *Conkright* recognizes that there is a conflict among the circuits about the "'allowable discretion'... in the course of calculating additional benefits due under the plan as a result of an ERISA violation." This Court remanded *Conkright* recognizing the district court's discretionary authority to remedy violations of "ERISA's notice requirements" on "the merits" even if a plan administrator proposes a different remedial approach. This Court should do the same here. Everyone, including CIGNA, presently recognizes that district courts possess broad remedial authority under ERISA §502(a) and *Conkright* to remedy violations of "ERISA's notice requirements," with the exception of the deference to plan interpretations required by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S.101 (1989). While a district court must defer to a plan administrator's interpretation of a plan provision if the administrator has discretionary authority and has theretofore only committed "a single honest mistake," the district court must provide appropriate remedies on "the merits" for the violations of "ERISA's notice requirements" established at trial.

Third, it cannot be overemphasized that the retirement benefits this class of over 27,000 current and former employees has lost because of CIGNA's "affirmatively and materially misleading notices" are irretrievable if the federal courts do not award appropriate remedies for violations of rights established at trial. CIGNA's current and former employees cannot obtain a "do-over" of their careers from 1998 to 2008 either with CIGNA or another employer.

III. ALTERNATIVELY, IF CIGNA'S PETITION IS GRANTED, THE AMARA PETITION SHOULD ALSO BE GRANTED.

If, despite the Amara Respondents' opposition and the Government's invitation brief, certiorari were granted to CIGNA, the Amara petition should also be granted. As the Government's brief points out, the District Court justified its failure to provide relief for the §204(h) violation in part by reference to the "substantial" relief that it was awarding for the misleading disclosures about periods of wear-away. SG Br. at 9, 19 and 21. If CIGNA were to succeed in overturning that "substantial" relief, the District Court should be allowed to revisit its decisions to decline to provide relief for the other violations. "If the first petition asserts that a judgment for damages is too high, a cross-petition must be filed by a party who wishes to argue that the same amount is too low." *Supreme Court Practice* (9th ed.), §6.35, at 489 n.133; *Barry v. Barchi*, 443 U.S. 55, 69 n.1 (1979) (concurring opinion) (cross-appeal is necessary to present

argument that "would result in greater relief than was awarded him by the District Court").

CONCLUSION

For the foregoing reasons, CIGNA's petition for a writ of certiorari should be denied and the Court should GVR Amara's petition in light of *Conkright*, or alternatively, grant Amara's petition if CIGNA's petition is granted.

Respectfully submitted,

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